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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1096

RAYMOND GENE NOVELLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
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The Petitioner RAYMOND GENE NOVELLI, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is set out in the Appendix, infra, pg. 21.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a Defendant waives appellate review of the sufficiency of the evidence where he moves for judgment of acquittal at the conclusion of the government's evidence but fails to renew the motion at the close of all the evidence.

2. Whether the evidence is sufficient to support Petitioner's conviction under Count Two (2) of the indictment.

STATUTES PROVISIONS INVOLVED

1. Title 18, United States Code, Section 1341: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or premises * * * places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1000 or imprisoned not more than five years, or both."

2. Rule 29, F.R. Crim. P.:

   (a) "Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the

entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict.

(c) If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the Court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

STATEMENT

The Petitioner, RAYMOND GENE NOVELLI, was convicted on a three-count indictment charging violations of Title 18, United States Code, Section 1341.

The "scheme and artifice to defraud" alleged in each count of the indictment involved subcontract agreements between Samuel W. Turner, doing business as Gypsum Systems, and El-Tee Corporation, the general contractor on three construction projects. Novelli, purportedly the agent for El-Tee, caused that corporation to enter into the subcontract agreements with Turner. He was to receive the "kickbacks" from Turner on each job. The payments to Novelli were to be concealed from El-Tee. Turner's bids were increased on each project enough to cover the payments to Novelli.

For the purpose of executing these schemes, Novelli knowingly caused the subcontracts to be mailed from the Southern District of Texas to El-Tee in Salt Lake City, Utah.

Turner was a "co-schemer but not as a defendant."

In 1968, T. C. Jacobsen, a major stockholder in both the Jacobsen Construction Company and the El-Tee Corporation was furnished the plans for two apartment projects in Pasadena, Texas, by Albert B. Stavitsky. Stavitsky, who had connections with the Franklin National Bank in New York, suggested that Jacobsen employ Novelli because of his expertise in construction and in putting bids together. (R. 6-8).

A contract was executed in which Jacobsen Construction Company agreed to employ Novelli on all construction projects built through financing obtained by Stavinsky or on jobs that Novelli obtained for Jacobsen. Novelli agreed to work under the direct supervision of Jacobsen and to diligently perform all tasks assigned to him. Jacobsen agreed to pay Novelli compensation equal to 75 per cent of all profits realized by it in excess of 5 percent of the construction cost of each project. Novelli was to

be advanced $1500 a month against the anticipated compensation. By addendum the parties agreed that Jacobsen could substitute El-Tee Corporation for Jacobsen. (R. 12-16).

Richard Squires, Jacobsen's Chief Estimator, headed the Texas projects, undertaken in the name of El-Tee to avoid the necessity of hiring union labor. (R. 21). Novelli was Squires' "right-hand man" in accumulating the subcontract bids and in supervising the construction work. It was his responsibility to assist in preparing the costs of the projects. He also did some work for Stavitsky in finding purchasers for the apartment projects. (R. 15-16). According to Squires, Novelli was working for Stavitsky "mainly." Secondarily, he was working for El-Tee. (R. 170). Novelli had no authority to bind either Jacobsen or El-Tee to any particular subcontract 'or any other type of document." (R. 169-170).

Stavitsky, financier on the projects had arranged for Novelli to come to Texas about two (2) months before Squires arrived, to obtain bids from the subcontractors. (R. 137-138). As the various projects got underway, Novelli took the subcontract bids, analyzed them, decided who could do the job and who was low and advised Squires.

Novelli negotiated quite extensively with the subcontractors and took bids from them. (R. 138-140). Eventually, Novelli obtained authorization to distribute the weekly "draw" checks to the subcontractors. (R. 141-142).

Turner first met Novelli in 1968, when he bid in the dry wall job on a project not involved in this suit. Novelli told him that he represented El-Tee and that Turner would "work through him." (R. 52-53).

Turner's next contact with Novelli was on the Princessa projects (count one of the Indictment), which he bid in at $175,000. His first bid was $186,759, but Novelli told him the price was too high. Turner refigured the bid to $170,764.03. $4,326 was added to the amount to cover the cost of a truck that Turner sold to Novelli, and the contract was made with El-Tee for $175,000. (R. 54-57). Novelli arranged for Turner to "overdraw" another job so he could pay off the bank note on the truck. The note was paid on May 23, 1969. (R. 57-59). Novelli told Turner that he planned to rent this truck to El-Tee for $100 a week. He did not want the title in his name, so he reimbursed Turner for the cost of the insurance. (R. 61-62). Turner later received a $2600 El-Tee check for truck rental payable to him. After he deposited the check Novelli wanted his money back and Turner returned it to him. (R. 63-64).

Two additional agreements covered by purchase orders were made with Turner on the Princessa job, one for $13,852, and the other for $700, to cover work that was not included in the original contract. Turner was paid a total of $189,168, and the job was completed except for $300 or $400 worth of work. (R. 66-69).

Turner's initial bid on the Jenkins House contract (Count two of the Indictment) was made to either Novelli or Squires. It did not include the fire walls which Turner figured at $3000. This would have increased his bid from $275,348 to slightly over $278,000. (R. 70-74). An additional $10,000 was added to the contract price to cover $1000 that Novelli owed Turner in a car trade and $9000 for the dry wall work on three houses that Novelli planned to build for himself, Squires and Stavitsky. (R. 73-75). The houses were never built, so Turner agreed to pay the $9000 to Novelli. (R. 76).

Turner was ultimately paid $293,800, which included change orders on the project of about $17,618. He was not paid for all of this work because by this time there had been an investigation by a private detective. Turner agreed for El-Tee to withhold the balance of the money since it belonged to the corporation. (R. 77-79).

Turner's original bid on the Red Bluff Project (Count three of the Indictment) included the cost of the fire walls, although it included the notation "add $8000 for fire walls." The cost of the fire walls would have been $700 and not $8000. The additional $8000 was a kick-back to Novelli. (R. 79-85). Turner received a total of $166,500 on Red Bluff. This included $8,500 for additional work on which the purchase order was signed by Novelli. (R. 83-84).

In addition to the truck, Turner agreed to pay Novelli a total of $17,000 in cash. He actually paid, according to his calculations from a series of complicated transactions involving the joint ownership of a boat, various automobile trades, and money allegedly covering the kick-backs, $8,971.14.

According to Squires, El-Tee had a tremendous volume of mail. All documents, purchase orders, checks, subcontracts and everything related to the projects were "dropped in the secretary's basket." She would mail them at the end of the day. (R. 162-163).

Garth Briggs was the assistant office manager for both Jacobsen and El-Tee, in Salt Lake City, Utah.

The corporate policy was that at the conclusion of each day the Pasadena, Texas, office personnel would put everything in an envelope and mail it to Salt Lake City. Subcontract agreements would ordinarily be included in these mailings.

The subcontractors would fill out "draw sheets" making an estimate of the work completed during the week. This was signed by the subcontractor and by a Texas representative of El-Tee, and mailed to Salt Lake City. Check in payment of the "draw sheet" estimates were written in Salt Lake City and air mailed back to El-Tee's Pasadena, Texas, office for distribution. (R. 226-230).

Jacobsen had a mail pick-up in Salt Lake City twice daily. The mail was brought back in a mail sack and given to the office manager. The manager would sort through the mail, put out any personal items addressed to company officials, and give the remainder to the receptionist, who would open and date stamp it. Then the receptionist returned the mail to the manager. He would resort it and distribute it to the appropriate departments. (R. 231-232).

The Princessa contract, executed May 16, 1969, and signed by Richard R. Squires for El-Tee and Sam Turner for Gypsum Systems was stamped "Received May 19, 1969, 10:28 A.M., Jacobsen Construction Company, Salt Lake City. (R. 235, Govt. Exhibit 6-A). The Utah business records showed a total payment on Princessa of $190,666. (R. 236).

The Jenkins contract, executed June 6, 1969, and also signed by Squires and Turner, did not contain a Jacobsen date stamp. Briggs attributed this to three possibilities: (1) it was not mailed; (2) it was overlooked in a pile of mail on the receptionist's desk; or (3) it arrived on a Saturday, and was picked up and processed by the office manager since the receptionist did not work on Saturday. Turner was paid a total of $295,283.47 on the contract. (R. 237-239 GX. 6-G).

The Red Bluff contract, signed by Squires and Turner, was executed August 14, 1969. It was date-stamped by Jacobsen August 18, 1969. Turner was paid a total of $173,592 on the contract. (R. 239-240, GX. 6-H). A purchase order reflecting changes on Red Bluff was included in the Jacobsen file, signed by Novelli and Turner. (R. 240-241 GX. 6-I).

Briggs never had observed Mr. Jacobsen carrying a subcontract from Houston to Salt Lake City, it was not within his "jurisdiction". (R. 240-241).

Jacobsen and El-Tee maintained records on the travel of their employees. The employees involved had United Airlines Credit cards, and always used them for travel. (R. 241-242).

Golden Barrett, a special agent-accountant for the FBI, examined all of the 1969 Jacobsen and El-Tee travel records. (R. 254-255). These records revealed that Squires was the only employee who traveled during May, 1969. He purchased an airline ticket from Houston to Las Vegas to Houston on May 6, and on May 18, he purchased airline tickets from Houston to Las Vegas to Reno to Las Vegas to Houston. No employee traveled between Houston and Salt Lake City from May 16 to May 19. (R. 255-256).

June 11, 1969, T. C. Jacobsen purchased tickets for himself and his son from Salt Lake City to Denver to Houston to Denver to Salt Lake City.

Squires obtained airline tickets on June 2, from Houston to Salt Lake City and return, and on June 24, Houston to Las Vegas and return. (R. 260).

Jacobsen purchased a round trip airline ticket from Salt Lake City to Houston on August 19, 1969.

On August 1, Squires purchased two tickets from Houston to San Francisco to Reno to San Francisco and back to Houston. (R. 262).

Jacobsen made "numerous" trips from Salt Lake City to Houston in 1969, but he could not recall carrying a subcontract back to the Salt Lake City office. (R. 21). He specifically recalled the trip to Houston with his son in June, 1969. He could not recall carrying a subcontract back with him on this occasion. (R. 21-22).

Squires made "frequent" trips to Salt Lake City during the first part of 1969. He did not remember carrying "any specific thing" with him. He did remember "carrying things and bringing them back" but he could not specifically remember carrying any of the Turner subcontracts between Houston and Salt Lake City. (R. 162-164).

REASONS FOR GRANTING THE WRIT

Novelli failed to comply with the provisions of Rule 29, F.R. Crim. P. He moved for judgment of acquittal at the conclusion of the government's evidence (R. 331-335), but failed to renew the motion at the conclusion of all the evidence, thus "waiving" his objections to the sufficiency of the evidence. *Hall v. United States,* 5 Cir. 1968, 403 F.2d 649.

The testimony adduced by Novelli after the government rested added no inculpatory evidence to the sufficiency of the government's case-in-chief. No rebuttal evidence was presented by the government and both sides closed after Novelli rested. (R. 352). Compare *Cephus v. United States,* D.C. Cir. 1963, 324 F.2d 893, 895, including footnote 7: see, cf., *United States v. Pitts,* 5 Cir. 1970, 428 F.2d 534, 535, footnote 2. Based upon

these authorities, Novelli submits that the sufficiency of the evidence was properly before the Court.

The government charged in each count of the indictment that Novelli and Turner "devised and intended to devise a scheme and artifice to defraud" El-Tee in the following manner:

1. Turner would agree to and would enter into a subcontract agreement with El-Tee on each of the projects;

2. Novelli, as agent for El-Tee, would cause the corporation to enter into the subcontract agreements with Turner;

3. Each subcontract agreement would include a provision for the payment of money by El-Tee to Turner "for the satisfactory completion of the work described therein" and that each "sum of money agreed upon would be greater" than the original bid submitted by Turner, "in order to enable Turner to transfer to "Novelli money for his personal benefit";

4, Novelli and Turner would conceal from El-Tee the fact that the payment agreed upon in the subcontract agreement included the money which was to be transferred to Novelli;

5. That on the dates specified, Novelli, for the purpose of executing the scheme and artifice, and in attempting to do so, "knowingly placed and caused to be placed in an authorized depository for mail matter within the Southern District of Texas a letter to be sent and delivered by the United States Post Office Department for the purpose of executing" the scheme and artifice, which letter was addressed to El-Tee in Salt Lake City, Utah, and "which constituted the said subcontract agreement" between El-Tee and Turner, in violation of the statute.

There is substantial evidence to prove that Novelli and Turner entered into separate agreements on the Princessa, Jenkins House, and Red Bluff projects. Novelli recommends that El-Tee accepts the Turner bids. Turner conveyed the truck and about $17,000 to Novelli in exchange for this assistance. Novelli did not execute the subcontract agreements himself and had no authority to do so. Each agreement was executed by Squires and Turner, in Harris County, Texas. They became valid at that time. Each of Turner's bids were substantially lower than the bids submitted by the other dry-wall subcontractors. There is no evidence that Turner did not satisfactorily complete the work described in the subcontract agreements.

Any mailing of the subcontract agreements to Salt Lake City, Utah, was only collateral to the execution of the alleged fraudulent scheme. El-Tee's payments were based upon the weekly "draw sheets" submitted by Turner as the work progressed on each project but the government did not charge that the mails were used in transmitting the "draw sheets" or the checks based thereon. The only mailings alleged in the indictment are those of the valid and fully executed subcontract agreements.

The evidence showed that Novelli's agreement with Turner on each project were reflected in Turner's bids. There are no allegations or proof that the bids were mailed to Salt Lake City. A "bid" connotes an offer to perform a contract for work and labor or supplying materials at a specified price and being essentially an offer, a bid creates no rights in either the offerer or the offeree until a contract comes into existence by acceptance. *United States v. Farina,* D.C.N.J., 153 F.Supp. 819, 821. A subcontractor can include anything or any price he chooses in the bid. It cannot be argued that the bids submitted

on the dry wall work by the other subcontractors—all of them substantially higher than Turner's bids— were fraudulent.

The critical issue hinges upon Novelli's relationship with El-Tee. There can be no active fraud under the allegations charged in the indictment. Even if it be assumed that the allegations, "defendant, Raymond G. Novelli, as agent for the El-Tee Corporation, would cause the El-Tee Corporation to enter into the sail subcontract agreement(s) with co-schemer Samuel W. Turner," was sufficient to charge the existence of either a fiduciary or confidential relationship between Novelli and El-Tee, the evidence was insufficient to support such claim.

Finally, even if there was sufficient evidence to submit the question of Novelli's relationship with El-Tee to the jury, the Court failed to require a finding on this crucial issue. Even though no objection was made to the charge on this ground, the issue is so fundamental to a determination of guilt or innocence that the Court's failure to so charge constituted plain error. Rule 52(b), F.R. Crim. P. There was conflicting evidence on the issue of Novelli's exact relationship with El-Tee, and one government witness, Squires, testified unequivocally that Novelli's primary duty was to Stavitsky.

In *Shushan v. United States*, 5 Cir. 1941, 117 F.2d 110, 115, a case involving a fraudulent scheme to bribe public officials to secure excessive fees from the state, the Court, while holding that the scheme constituted an active fraud, said: "We agree with appellants that the constructive frauds which equity in civil cases sometimes sets up to do justice will not suffice under (the mail fraud statute); and that there must be a purpose to do wrong which is inconsistent with moral uprightness."

This same statement was approved in *Bradford v. United States,* 5 Cir. 1942, 129 F.2d 274.

In *Epstein v. United States,* 6 Cir. 1942, 174 F.2d 754, 766, the Court said: "Assuredly, we must consider fraud in mail fraud cases according to the standard of what fraud is in civil cases. That, however, is no qualification of the rule that to sustain a charge of using the mails to defraud, there must be proof of an actual fraud, rather than a constructive fraud; and the fact that the crime of using the mails to defraud is not limited to what would give rise to a common-law action for deceit means, for instance, that a showing of loss to the victim is not necessary to conviction for mail fraud; it does not imply that constructive fraud, or anything less than actual fraud, can sustain the charge of using the mails to defraud."

While it is true that mailing is an essential element of the offense denounced by 18 U.S.C. 1341, it is equally true that a fraudulent scheme is an essential element in the crime, and that the failure to allege a scheme to defraud and to prove it substantially as alleged, is fatal to the prosecution. *Aiken v. United States,* 4 Cir. 1939, 108 F.2d 182.

The subject indictment falls far short of the necessary allegations charging a fraudulent scheme. Compare *Weiss v. United States,* 5 Cir. 1941, 120 F.2d 473, 122 F.2d 675; *Shushan v. United States,* supra. This is true even though the scheme to defraud need not be set forth with such precision as if it were the gist of the offense. *See Leche v. United States,* 5Cir. 1941, 118 F.2d 246, and the cases there cited.

The insufficiency of the evidence on this vital issue was compounded by the Court's failure to require a jury finding that Novelli occupied a confidential or fiduciary position with El-Tee and that he violated that position of trust by the transaction with Turner.

18 U.S.C., 1341, does not reach all frauds, but only those in which the use of the mails is an integrated part of their execution, or is "incident to an essential element of the scheme" to defraud. *Kann v. United States,* 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88 (1944); *Pereira v. United States,* 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954).

The mailing is not in execution of the scheme if use of the mails is only collateral or incidental to the scheme, or made after the scheme is fully consummated. *Parr v. United States,* 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960); *Gordon v. United States,* 5 Cir. 1966, 358 F.2d 112. It is in execution of the plan if it is in furtherance of it, and use of the mails should have been reasonably contemplated. *Brown v. United States,* 5 Cir. 1964, 328 F.2d 652; *Milam v. United States,* 5 Cir. 1963, 322 F.2d 104. The same is true if one does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use could reasonably be foreseen, *Pereira v. United States, supra; Henderson v. United States,* 5 Cir. 1970, 425 F.2d 143; or if use of the mails is part of an overall or unitary scheme to defraud, *Adams v. United States,* 5 Cir. 1963, 312 F. 2d 137; or if use of the mails was such an integral and material part of the scheme that it was foreseen and contemplated, *Kloian v. United States,* 5 Cir. 1965, 349 F.2d 291; *Brown v. United States, supra.*

It does not appear that the subcontract agreements, which were the subject of each count in the indictment, and the corpus delecti of each offense, were in execution of a scheme to defraud. If there was any fraud, it was completed when Turner submitted his bids. The actual agreements were negotiated by and between Squires and Turner. They were valid Texas contracts at the time and place of their execution. Even though they signified the contractual relationship between Turner and El-Tee, the later payments to Turner were based upon the weekly work estimates. The use of the mails in sending the agreements to Utah was only collateral and incidental to the alleged deception inherent in the bids and the draw sheets. Cf., *Milam v. United States,* 5 Cir. 1963, 322 F.2d 104; *Stapp v. United States,* 5 Cir. 1941, 120 F.2d 898; and see, *Parr v. United States, supra.*

As the Court said in *Stapp v. United States,* 120 F.2d at 899: "However, the mailing or causing the letter to be mailed is the crime, not merely devising the fraudulent scheme, and it is vital to the commission of the offense that the letter be in furtherance of the scheme."

Even if Novelli be mistaken in the foregoing conclusion, it seems clear from the evidence that he did not himself mail or directly cause the mailing of the three subcontract agreements from Texas to Utah. It is settled, however, that one "causes" the mails to be used when he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. *Hart v. United States,* 5 Cir. 1940, 112 F.2d 128, cert. den. 311 U.S. 684, 61 S.Ct. 60, 85 L.Ed. 473; *Glenn v. United States,* 5 Cir. 1962, 303 F.2d 536. But compare

Spillers v. United States, 5 Cir. 1931, 47 F.2d 893. Novelli submits that the evidence is insufficient to prove he "set forces in motion which foreseeably would involve mail uses." *Marvin v. United States,* 10 Cir. 1960, 279 F.2d 451; *Henderson v. United States,* 5 Cir. 1970, 425 F.2d 134; *Getchell v. United States,* 5 Cir. 1960, 282 F. 2d 681; *United States v. Brickey,* E.D. Ark. 1969, 296 F.Supp. 742.

The government sought to establish the mailings in issue by circumstantial evidence, relying almost wholly on the usual and customary practice followed by El-Tee, bolstered by Agent Barrett's examination of the corporate travel records. This evidence as to each count was insufficient and failed to eliminate every other reasonable hypothesis save the mailings of the agreements.

Alternatively, the government failed to prove that the Jenkins House agreement covered by the second count of the indictment was mailed from Texas to Utah. It bore no Jacobsen date stamp. Government witness Briggs explained the absence of the date stamp as follows: "One is that possibly (sic) was not mailed. Two is that in the pile of mail on the receptionist's desk, she could have overlooked a piece of document as it went through. Or, three, if it arrives on a Saturday, our office manager picks up the mail, he processes what he feels to be important and takes it out, and many of these things are not date stamped." (R. 238).

This testimony clearly raises a reasonable doubt that the Jenkins House contract was mailed from Texas to Utah. Novelli's conviction on Count Two of the indictment should be set aside because of this fatal defect in the evidence.

CONCLUSION AND PRAYER

For all the reasons stated above, the petition for writ of certiorari should be granted and petitioner's conviction and sentence set aside. In the alternative, the judgment of the court below should be vacated and this cause remanded for consideration without regard to any "waiver" of the sufficiency of the evidence issue.

Petitioner prays for such relief.

Respectfully submitted,

WILL E. GRAY
Lawyer for Petitioner
1210 State National Building
Houston, Texas 77002

CERTIFICATION

I certify that three copies of the foregoing petition for writ of certiorari was mailed to the Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C., 20530.

WILL GRAY

APPENDIX

United States Court of Appeals

Fifth Circuit

Office of the Clerk

Edward W. Wadsworth
Clerk

600 Camp St.—Rm. 102
New Orleans, La. 70130

January 3, 1974

Mr. Will Gray
Attorney at Law
Suite 1210—412 Main Street
Houston, Texas 77002

No. 73-1903—U.S.A. vs. Raymond G. Novelli

MANDATE STAYED TO:
JANUARY 12, 1974
(SEE ORDER ENCLOSED)

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ CLARE F. SACHS
Deputy Clerk

enc.
cc Mr. James R. Gough

In The

United States Court of Appeals

For The Fifth Circuit

No. 73-1903

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

RAYMOND G. NOVELLI,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(December 13, 1973)

Before WISDOM, AINSWORTH and GEE
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

United States Court of Appeals

For The Fifth Circuit

October Term, 1973

No. 73-1903

D. C. Docket No. CR 72-H-160

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

RAYMOND G. NOVELLI,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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JUDGMENT

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 13, 1973

Issued as Mandate:

No. 73-1096

FILED
APR 19 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

RAYMOND GENE NOVELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1096

RAYMOND GENE NOVELLI, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on three counts involving use of the mails to execute a scheme for receiving kickbacks in violation of 18 U.S.C. 2 and 1341. He was sentenced to consecutive four year terms on Counts I and II. He was sentenced to a five year term of imprisonment on Count III, but imposition of sentence was suspended and he was placed on probation for five years at the conclusion of his release from confinement, the suspension of the sentence to be conditioned upon restitution of the total amount of money alleged in the indictment to have been taken ($21,200) within 30 days after judgment has become final. A fine of $1,000 was additionally imposed on each of the three counts. The court of appeals affirmed without opinion (Pet. App. 21).

Petitioner was employed by El-Tee Corporation in Houston, Texas, to put bids together and bring together initial estimates for designated projects[1] (App. 9, 184-187).[2] El-Tee was a subsidary of Jacobsen Construction Company, with its home office in Salt Lake City, Utah (App. 228). Samuel W. Turner,[3] owner of Gypsum Systems in Houston, a dry wall contracting firm, met petitioner when Turner bid on a subcontract for El-Tee Corporation in Houston (App. 52-53). Turner then bid on the Princessa Apartments dry wall job in Houston, and subsequently on jobs involving the Jenkins House Apartments and Red Bluff Villas, both in Pasadena, Texas (App. 53-54, 69, 79).[4]

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[1]Petitioner's contract of employment executed on August 16, 1968, provided that his compensation should be one percent of the cost of construction, to be paid at the rate of $1,500 per month during construction with the balance after completion of each project. A subsequent October 7, 1968 contract, provided that petitioner was to receive 75 per cent of all profits realized by the contractor in excess of 5 per cent of the construction cost on each project. Petitioner was to be advanced $1,500 per month beginning with the execution of the first of such contracts, and the balance, if any, was to be paid after completion (App. 11-16).

[2]"App." refers to the appendix filed with the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[3]Turner was named in the indictment but was not indicted (App. 395-401).

[4]Count I of the indictment (App. 395-397) concerned Turner's agreement with El-Tee Corporation for work to be performed on the Princessa Apartments, Count II (App. 397-399) concerned the Jenkins House Apartments, and Count III (App. 399-401) the Red Bluff Villas.

On the Princessa Apartments job, Turner initially bid $186,759 (App. 55). The bid was submitted to petitioner in person without any written record being kept (App. 56). Petitioner told Turner his bid was too high and Turner, after refiguring the costs, lowered his bid to $170,764.03(App. 57). The May 16, 1969, contract price, however, was set at $175,000, the difference between Turner's bid and the actual contract price being turned over to petitioner (App. 57-58,65).

On the Jenkins House Apartments, Turner initially gave petitioner a bid of $275,348 (App. 70-71). Turner then increased his bid by $3,000 to include firewalls (App. 72-74). The June 6, 1969 contract was written for $288,000, including $1,000 petitioner owed Turner on a car trade and a $9,000 kickback to petitioner (App. 74-76, 86-88).

On the Red Bluff Villas job, petitioner bid $150,000 (App. 80). His bid was accepted by petitioner but the August 14, 1969 contract was written for $158,000, the $8,000 balance being a kickback to petitioner (App. 80-84). Turner testified that he paid the kickbacks because he knew if he did not, petitioner would not give him any more work (App. 85). Turner's records substantiated the fact that the kickbacks had been paid (App. 91-92, 97-100).[5]

The Princessa subcontract, executed on May 16, 1969, by Turner and Richard Squires, who was in charge of the El-Tee Texas operations, was stamped"[R]eceived May 19, 1969, 10:28 a.m., Jacobsen Construction Company, Salt Lake City" (App. 138, 235). The Jenkins House Apartments subcontract, executed in Texas on June 6, 1969, did not contain a date stamp (App. 237-239).

[5]The actual contract prices paid were subsequently adjusted to reflect change orders made by El-Tee.

The Red Bluff Villas subcontract, executed on August 14, 1969, by Turner and Squires, was stamped received on August 18, 1969, in Salt Lake City (App. 240).

Petitioner did not testify. He called two witnesses, neither of whom contradicted the government's testimony establishing the kickbacks (App. 336-352).

1. Petitioner contends that the evidence was insufficient to support his conviction. This contention is answered by the facts which show petitioner's connection with the scheme to defraud El-Tee by arranging financial kickbacks to himself as a condition to granting dry wall contracts to Turner, in violation of his fiduciary duty to the corporation and, specifically, his contract with it.[6] Moreover,

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[6]The fact that the judge did not require the jury to find explicitly that petitioner had had sufficient relationship with El-Tee to create a violation of that relationship is immaterial. Petitioner failed to request a specific finding or to object to the charge to the jury on this ground, although he did voice other objections to the charge (App. 378-379). Moreover, in his charge the judge stated as follows (App. 369):

> Three essential elements are required to be proved in order to establish the offense charged in the indictment:
>
> First, the act or acts of having devised or having intended to devise a scheme or artifice to defraud, or attempt to defraud, El-Tee Corporation out of the sums of money as alleged in the indictment;
>
> Second, the act of acts of placing, or causing to be placed, in an authorized depository for mail matter, a letter intended to be sent or delivered by the post Office Department, as charged; and
>
> Third, the act or acts of so using the United States Mail wilfully and with specific intent to carry out some essential step in the execution of said scheme or artifice to defraud, or attempt to do so as charged.

as petitioner himself admits (Pet. 10), while he did move for a judgment of acquittal at the conclusion of the government's evidence, he failed to preserve his rights by renewing that motion at the close of all the evidence, see *Hall* v. *United States*, 403 F. 2d 649, 650 (C.A. 5).[7]

2. Petitioner contends that the mailing of the three contracts in question was not such an essential part of the fraudulent scheme as to create a violation of 18 U.S.C. 1341. The mailing of the contracts to the headquarters of El-Tee in Salt Lake City, Utah, however, was necessary for the purpose of executing the scheme, which involved defrauding the corporation of the sums of money involved. Moreover, since payments to subcontractors on Texas subcontracts were also sent from Salt Lake City to Houston (App. 229), the receipt of the proceeds of the fraudulent scheme required the use of the mails.

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[7]Petitioner's contention that the indictment was insufficient to charge an actual fraud is without merit. That indictment (App. 395-401) charges petitioner, acting as an agent for El-Tee Corporation, with having agreed to cause El-Tee to enter into three contracts with Turner at inflated prices so that Turner could transfer the excess to petitioner, the transfers to be concealed from El-Tee. The charge is thus one of actual, not constructive, fraud. See *Epstein* v. *United States*, 174 F.2d 754, 765-766 (C.A. 6): "Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud. To constitute actual fraud, there must be such a fraud as affects the conscience. Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interest. * * * [C]onstructive fraud is a term that means, essentially, nothing more than the receipt and retention of unmerited benefits" (citations omitted.).

In any event, it is not necessary that use of the mails be planned as an essential element of the scheme. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonable be foreseen, even though not actually intended, then he 'causes' the mails to be used", *Pereira* v. *United States*, 347 U.S. 1, 8-9; see also *United States* v. *Sampson*, 371 U.S. 75.[8]

3. Petitioner contends that there was insufficient evidence to prove that the Jenkins House Apartment sub-contract was mailed. The June 6, 1969, subcontract, although received by El-Tee, did not contain a date stamp. Garth E. Briggs, who had been employed by Jacobsen Construction Company at the time the alleged fraud took place, testified that the policy of the Company's Texas office "was that at the conclusion of each day they would put in an envelope everything to be mailed to Salt Lake City and mail it immediately, so there is supposed to be a daily mailing to our Salt Lake City office" (App. 229; see also 163). He added that subcontracts would be included in the mailings (App. 229). When the mail was received in Salt Lake City, the office manager would sort out personal mail and take the remainder to the receptionist who would open and date it (App. 230-231). Both the Princessa and Red Bluff Villas subcontracts were dated in this manner (App. 235, 240). Briggs explained that there could be three explanations why the Jenkins House Apartments subcontract

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[8]This is not a case like *United States* v. *Maze*, No. 72-1168 (decided January 8, 1974), in which this Court held the fraudulent use of a credit card was not a violation of the mail fraud statue. In *Maze* the mails were used only to send bills from defrauded motel owners to the bank which managed the account of the stolen credit card. Here the mails were used to notify El-Tee of the fact that contracts had been signed, and to send the payments which were the object of the scheme - elements which were essential to the success of the fraud, and not merely subsequent events as in *Maze*.

lacked a date stamp. First, it had not been mailed;[9] second, it had not been stamped due to the receptionist's oversight; or third, it had arrived on a Saturday, when the receptionist did not work, and had been processed by the office manager, who did not customarily use the date stamp (App. 238, 245-246.

In his charge to the jury the trial judge stated as follows (App. 373):

> The Government is not obligated to prove use of the mails by direct evidence. Use of the mails may be established by circumstantial evidence. You should consider the totality of the surrounding circumstances in determining whether or not defendant caused the mails to be used, including:
>
> (1) Whether or not it was El-Tee Corporation's normal business practice to mail the subcontracts from Houston, Texas to the home office in Salt Lake City, Utah;
>
> (2) Whether or not the subcontracts arrived in Salt Lake City, Utah, in the normal channel of a mail matter; and
>
> (3) Whether or not it would have been possible for an El-Tee Corporation employee to have hand-carried the subcontractors [sic] from Houston to Salt Lake City.

Viewing the evidence in the light most favorable to the Government, there was sufficient evidence to show the contract was mailed from Houston to Salt Lake City in

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[9]The possibility that it had been hand carried to Salt Lake City by a company representative was refuted by evidence indicating that the only such representative travelling between Salt Lake City and Houston at the relevant time had not carried it (App. 22, 260).

the ordinary course of business and to sustain petitioner's conviction, Glasser v. *United States*, 315 U.S. 60, 80; see also *Pereira* v. *United States, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.